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Nos. 04-805, 04-814

In The Supreme Court of the United States

TEXACO, INC., *Petitioner*

v.

FOUAD N. DAGHER, *et al.*

SHELL OIL COMPANY, *Petitioner*

v.

FOUAD N. DAGHER, *et al.*

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR AMERICAN BANKERS ASSOCIATION, CONSUMER BANKERS ASSOCIATION AND FINANCIAL SERVICES ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION OF AMERICAN BANKERS ASSOCIATION, CONSUMER BANKERS ASSOCIATION AND FINANCIAL SERVICES ROUNDTABLE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, the American Bankers Association, Consumer Bankers Association, and Financial Services Roundtable respectfully move this Court for leave to file the accompanying brief, as *amici curiae* in support of petitioners Texaco, Inc. and Shell Oil Company.

Letters from counsel for petitioners consenting to the filing of this brief have been filed with the Clerk of this Court pursuant to Supreme Court Rule 37.3(a). Respondents have withheld consent.

This case involves a significant issue in antitrust law: whether the *per se* rule of liability should be applied to the ordinary business conduct of joint ventures that enhance economic efficiency. Financial services networks – *e.g.*, automated teller machine networks, credit card networks and debit card networks – are a critical part of our nation's economy. *Amici's* members, which comprise the vast majority of financial services companies in the United States, are participants in those networks, many of which are structured as joint ventures. *Amici* seek to bring to the Court's attention the potential cost that the court of appeals' decision, unless reversed, may impose on the efficient operation of our nation's financial services industry.

Accordingly, *amici* respectfully request leave to file the accompanying brief.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. JOINT VENTURES FORM THE BACKBONE OF OUR NATION'S FINANCIAL SERVICES INDUSTRY AND ARE ESSENTIAL TO ITS EFFICIENT OPERATION	4
II. THE COURT OF APPEALS' APPLICATION OF THE *PER SE* RULE TO THE ORDINARY BUSINESS CONDUCT OF JOINT VENTURES IS INCONSISTENT WITH THIS COURT'S PRECEDENTS AND THE FUNDAMENTAL GOALS OF THE ANTITRUST LAWS	6
A. The *Per Se* Rule Of Antitrust Liability Condemns Conduct That Has No Purpose Or Effect Other Than To Diminish Competition	7
B. Over The Last Three Decades, This Court Has Relied On New Economic Learning And Judicial Experience To Narrow Application Of The *Per Se* Rule	10
C. The Court of Appeals' Application Of The *Per Se* Rule To Joint Ventures Is Inconsistent With This Court's Precedents	13
D. The Court of Appeals' Holding Harms The Ability Of Financial Service Businesses To Compete By Threatening Their Network Joint Ventures	17
CONCLUSION	18

TABLE OF AUTHORITIES

Page

CASES:

Albrecht v. Herald Co., 390 U.S. 145 (1968) 12

Augusta News Co. v. Hudson News Co., 269 F.3d 41 (1st Cir. 2001) 16

Broadcast Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979) ..... *passim*

California Dental Ass'n v. FTC, 526 U.S. 756 (1999) 8, 9

Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918) 8

Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) ..... *passim*

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) 3, 4, 13

Fraser v. Major League Soccer, L.L.C., 284 F.3d 47 (1st Cir. 2002) 16

Lewis v. BT Inv. Managers, Inc., 447 U.S. 27 (1980) 2, 4

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 17

NCAA v. Board of Regents, 468 U.S. 85 (1984) 8, 10, 13

National Bancard Corp. v. Visa U.S.A., 779 F.2d 592 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986) 16

Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985) ... 7, 11, 13

Nynex Corp. v. Discon, Inc., 525 U.S. 128 (1998) 12

Polk Bros. Inc. v. Forest City Enters. Inc., 776 F.2d 185 (7th Cir. 1985) 8, 14

TABLE OF AUTHORITIES – Continued

Page

Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987) 14

Standard Oil Co. v. United States, 221 U.S. 1 (1911) 7

State Oil Co. v. Khan, 522 U.S. 3 (1997) 12, 17

Tanaka v. University of S. Cal., 252 F.3d 1059 (9th Cir. 2001) 9

Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) 14

United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899) 14

United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) 11

United States v. Penn-Olin Chemical Co., 378 U.S. 158 (1964) 13

United States v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir. 1980) 10

United States v. Visa U.S.A., Inc., 163 F. Supp. 2d 322 (S.D.N.Y. 2001), *modified in part*, 183 F. Supp. 2d 613 (S.D.N.Y.), *aff'd*, 344 F.3d 229 (2d Cir. 2003), *cert. denied*, 125 S. Ct. 45 (2004) 6

Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) 3, 17

White Motor Co. v. United States, 372 U.S. 253 (1963) 12

STATUTES:

15 U.S.C. § 1 7

15 U.S.C. § 15(a) 10

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS:

Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* (2d ed. 2003) 8, 10, 15, 16

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Kimberly Gleason, Ike Mathur & Roy A. Wiggins III, *Evidence of Value Creation in the Financial Services Industry Through the Use of Joint Ventures and Strategic Alliances*, The Financial Rev. 213 (May 2003) 6

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VisaNet Fact Sheet, http://corporate.visa.com/md/fs/corporate/visanet.jsp 5

INTEREST OF *AMICI CURIAE*[1]

This case involves a significant issue in antitrust law – whether the ordinary business conduct of a joint venture that enhances economic efficiency may be condemned under the *per se* rule of liability.

The American Bankers Association is the largest banking trade association in the country. It represents banks of all sizes, including community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks.

The Consumer Bankers Association is a trade association that represents regional and super community banks as well as large bank holding companies. Its members collectively hold two-thirds of the banking industry's total assets and are leaders in consumer financial services, including auto finance, home equity lending, card products, education loans, small business services, community development, investments, deposits and delivery.

The Financial Services Roundtable represents one hundred of the largest integrated financial services companies providing banking, insurance and investment products and services to American consumers.

Amici's members are participants in many joint ventures, *e.g.*, credit card networks, debit card networks, automated teller machine networks, and various financial clearinghouse networks. Those joint ventures form the backbone of our nation's financial services industry. As a

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[1] Letters from counsel for petitioners consenting to the filing of this brief have been filed with the Clerk of this Court pursuant to Supreme Court Rule 37.3(a). Respondents have withheld consent and, thus, a motion for leave to file this *amicus curiae* brief is being submitted as one document with the brief in accord with Supreme Court Rule 37.3(b). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

result, *amici* have a strong interest in ensuring that the lower courts do not summarily condemn under the *per se* rule of antitrust liability joint ventures that enhance economic efficiency and consumer welfare.

SUMMARY OF ARGUMENT

The court of appeals' decision to extend the *per se* rule of antitrust liability to the ordinary business conduct of joint ventures is fundamentally inconsistent with this Court's teachings and casts a shadow of uncertainty over important parts of the nation's economy, including the financial services industry. The Court should remove this uncertainty by instructing the lower courts that *per se* condemnation is the exception, not the rule, in antitrust analysis and has a very limited role to play in evaluating the lawfulness of joint ventures.

I. The financial services industry is essential to the health of our nation's economy. *See Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 38 (1980). Joint ventures form the backbone of this industry: coalitions of banks, credit unions and other financial services firms participate in joint ventures, including credit card, debit card and automated teller machine networks, to enable consumers to withdraw cash, make payments and transact business across the country and around the world. These joint ventures provide products and services that no single member could provide, and in particular enable smaller banks and other financial institutions to offer products and services that, because of their limited size and geographic reach, they could not offer on their own.

II. This Court has emphasized that the rule of reason is the "prevailing standard" of antitrust analysis. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977). Under this standard, a court must undertake an analysis of the conduct at issue, and the specific market and business circumstances in which that conduct arises, to

determine whether the conduct in fact diminishes competition. The *per se* rule is a truncated version of this analytical approach; where judicial experience has taught the courts that a specific type of conduct has no purpose or effect other than to diminish competition, such conduct is "conclusively presumed illegal without further examination under the rule of reason." *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 8 (1979) ("*BMI*").

This Court has recognized, however, that applying the *per se* rule of antitrust liability to cases that do not involve "manifestly anticompetitive" conduct undermines the purposes of the antitrust laws. *GTE Sylvania*, 433 U.S. at 50. Because "it is sometimes difficult to distinguish robust competition from conduct with long-run anti-competitive effects," *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-768 (1984), broad application of the *per se* rule is very likely to result in summary condemnation of conduct that actually enhances competition. The risk of such false condemnations, in turn, deters businesses from engaging in conduct that enhances economic efficiency and consumer welfare. *See Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004). For this reason, the Court has narrowed the application of the *per se* rule in light of new economic learning about specific types of business conduct and judicial experience with the rule's adverse effects.

The court of appeals' decision ignores this teaching and extends the *per se* rule to the ordinary business conduct of joint ventures that enhance economic efficiency. It does so because the conduct at issue in this case relates to the decision of the joint venture partners to set the price of their commonly produced products, and the court of appeals believed that agreements on price – even those that relate to the price of the joint venture product – should presumptively be subject to *per se* condemnation. Pet. App. 12a-13a. But this Court and other courts of appeals have long recognized that because joint ventures

"hold the promise of increasing a firm's efficiency and enabling it to compete more effectively," joint venture conduct that is subject to the antitrust laws is presumptively "judged under the rule of reason." *Copperweld Corp.*, 467 U.S. at 768. And while acknowledging that the establishment of the price of the venture's products is "literally 'price-fixing,'" this Court has held that such conduct contributes to the efficient operation of the venture and therefore is "not *per se* in violation of the Sherman Act." *BMI*, 441 U.S. at 9. If the rule were otherwise, joint ventures could not function efficiently, if at all.

The court of appeals' decision thus increases the risk that joint ventures of all types will find themselves the victims of unmeritorious lawsuits, in which plaintiffs seek to capitalize on the minimum burdens the *per se* rule imposes to earn antitrust treble damages. The threat of such liability is a powerful deterrent to the continuing operation of, and investment in, financial services joint ventures. The resulting harm to these networks will be felt not only by financial services firms – especially smaller banks and other institutions – but also by consumers and the economy as a whole. The court of appeals' decision threatens to undermine, not advance, the purposes of the antitrust laws and therefore should be reversed.

ARGUMENT

I. JOINT VENTURES FORM THE BACKBONE OF OUR NATION'S FINANCIAL SERVICES INDUSTRY AND ARE ESSENTIAL TO ITS EFFICIENT OPERATION

This Court has recognized that "both as a matter of history and as a matter of present commercial reality, banking and related financial activities are * * * essential to the health of [the nation's] economy and to the well-being of its people." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 38 (1980). The nation's financial system "accounts for 7.5 percent of our GDP and employs 5 percent of our workforce"; it is "as competitive as ever in

recent memory." *Financial Services Act of 1998, H.R. 10: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 105th Cong. 61-63 (1998) (statement of Robert E. Rubin, Secretary, Department of Treasury).

The strength and competitiveness of our financial system is attributable in large measure to financial services networks, including credit card networks, automated teller machine ("ATM") and debit card networks, and automated clearinghouse networks. These networks enable institutions of all sizes – but in particular smaller institutions that lack the scale and geographic reach of some of their rivals – to offer products and services that no single firm could offer on its own. Visa and MasterCard, for example, each has more than 20,000 financial institution members and hundreds of millions of cardholders in their credit, debit and ATM networks. The Shazam ATM and debit card network has approximately 1600 member banks in 29 states. The CO-OP Network comprises 1841 credit unions, and serves 23 million cardholders in all 50 states and several foreign countries, while the Armed Forces Financial Network serves 336 credit unions and military banks and tens of millions of cardholders.

Financial services networks enable consumers to obtain cash, make purchases and transact business anywhere in the United States and in most parts of the world. According to the Federal Reserve System, network-based payments recently overtook checks as the leading type of non-cash payments. Federal Reserve System, *The 2004 Federal Reserve Payments Study: Analysis of Noncash Payment Trends in the United States: 2000-2003*, at 10 (2004), *available at* http://www.frbservices.org/Retail/pdf/2004PaymentResearchReport.pdf. The Visa network alone handles over $5 billion a day, or $3.4 trillion in transactions annually. VisaNet Fact Sheet, http://corporate.visa.com/md/fs/corporate/visanet.jsp. The "increasing use of payment networks for new or alternative payment uses," including online payment networks, will serve only to enhance the importance of financial services networks to our nation's economy. Brian Mantel & Tim McHugh,

Changing E-Payment Payment Networks in the U.S.: The Strategic, Competitive & Innovative Implications (2002), http://www.chicagofed.org/emerging_payments_and_policy/files/evolving_epayment_networks.pdf.

Most financial services networks, including many of the largest networks, are joint ventures. Coalitions of banks, credit unions and other financial service firms provide services that no single member could provide, *e.g.*, nationwide ATM services and ubiquitous credit card acceptance. *See, e.g., United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 332 (S.D.N.Y. 2001), *modified in part on other grounds*, 183 F. Supp. 2d 613 (S.D.N.Y.), *aff'd*, 344 F.3d 229 (2d Cir. 2003), *cert. denied*, 125 S. Ct. 45 (2004). For example, the Visa and MasterCard networks, the Shazam ATM network, and the CO-OP and Armed Forces Financial credit union networks are all currently organized as joint ventures. Although some financial services networks now use the corporate form, "joint venture and strategic alliances are an increasingly important mechanism for growth in the financial services industries, as evidenced by the substantially increasing number of transactions since 1990." Kimberly Gleason, Ike Mathur & Roy A. Wiggins III, *Evidence of Value Creation in the Financial Services Industry Through the Use of Joint Ventures and Strategic Alliances*, The Financial Rev. 213, 214 (May 2003). Financial services joint venture networks are, in short, the backbone of our nation's financial system.

II. THE COURT OF APPEALS' APPLICATION OF THE *PER SE* RULE TO THE ORDINARY BUSINESS CONDUCT OF JOINT VENTURES IS INCONSISTENT WITH THIS COURT'S PRECEDENTS AND THE FUNDAMENTAL GOALS OF THE ANTITRUST LAWS

The court of appeals' error in this case flows from a fundamental misunderstanding of the role of the *per se* rule in antitrust jurisprudence. Over the last 30 years, this Court has provided a series of guideposts to the

proper application of the *per se* rule and repeatedly has warned against the dangers of applying the rule to business conduct that is not "manifestly anticompetitive." *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50 (1977). As the court of appeals' decision illustrates, however, lower courts all too frequently ignore these warnings and allow plaintiffs to use the presumptions of the *per se* rule – coupled with the threat of treble damages – to attack business conduct that, in fact, enhances competition. *Amici* believe that the Court should take this opportunity to establish clearly that *per se* condemnation is the exception, not the rule, under the federal antitrust laws and has a very limited role to play in the analysis of joint ventures.

A. The *Per Se* Rule Of Antitrust Liability Condemns Conduct That Has No Purpose Or Effect Other Than To Diminish Competition

1. The purpose of the antitrust laws is to protect consumers from conduct that makes markets less competitive. *See, e.g., Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-20 (1979) ("*BMI*"). Although Section 1 of the Sherman Act, by its terms, prohibits all agreements "in restraint of trade," 15 U.S.C. § 1, the Court recognized shortly after the statute's enactment that this proscription could not be read literally. *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911). This is because "every commercial agreement restrains trade." *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289 (1985). For almost a century, therefore, the Court has held that "[w]hether [an] action violates § 1 of the Sherman Act depends on whether it is adjudged an *unreasonable* restraint." *Ibid.*

An unreasonable restraint of trade is one that harms consumers by raising the overall market price of a good or service or decreasing the total quantity sold. *BMI*, 441 U.S. at 19-20. The judicial inquiry into whether a specific restraint has this effect necessarily depends on the

economics of the market and the restraint at issue. *See NCAA v. Board of Regents*, 468 U.S. 85, 103-104 (1984). *See also* 7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1500 (2d ed. 2003) (the inquiry into the "reasonableness" of a restraint must be "disciplined by the purposes of the antitrust laws" and instructed "by knowledge of the economy generally or by experience with the particular market under scrutiny").

Historically, the Court has applied either of two basic modes of analysis in determining whether a challenged restraint is unreasonable under the antitrust laws: the rule of reason or the *per se* rule. More recently, the Court has developed a third mode of analysis – the so-called "quick look" rule of reason approach. *See, e.g., California Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999); *NCAA*, 468 U.S. at 109-110. All three modes of analysis, however, are merely variations of the rule of reason. The differences among them relate to the strength of the legal presumptions that apply under each rule and the allocation of various burdens in each analysis.

2. This Court and the lower courts have long recognized that "[t]he war of all against all is not a good model for any economy. Antitrust law is designed to ensure an appropriate blend of cooperation and competition, not to require all economic actors to compete full tilt at every moment." *Polk Bros. Inc. v. Forest City Enters. Inc.*, 776 F.2d 185, 188 (7th Cir. 1985) (Easterbrook, J.). Rule of reason analysis, therefore, is an inquiry into whether the *net* effect of a particular type of business conduct is to enhance competition in the marketplace, or to diminish it. *See Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918). "To determine that question," Justice Brandeis wrote in his classic formulation of the rule, "the court must ordinarily consider the facts peculiar to the business in which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable." *Ibid.*

As applied in practice, the rule of reason imposes a series of shifting burdens on litigants. First, the plaintiff

must prove that an agreement between two or more market participants has or is likely to have an adverse effect on competition. If the plaintiff is successful, the burden then shifts to the defendant to show that the agreement has procompetitive effects. If the defendant makes this showing, the burden shifts back to the plaintiff to prove that the agreement at issue is not reasonably related to the achievement of the agreement's procompetitive effects. *See, e.g., Tanaka v. University of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001). Ultimately, the issue is whether the anticompetitive effects of the agreement outweigh the procompetitive effects. *See, e.g., GTE Sylvania*, 433 U.S. at 54-55 (weighing the benefits of enhanced interbrand competition against the loss of intrabrand competition).[2]

3. The *per se* rule is a specific application of this analytical framework. *See* Robert H. Bork, *The Antitrust Paradox* 18 (1978). As the Court explained in *BMI*, judicial experience has taught that certain types of agreements are so "plainly anticompetitive" and lacking "any redeeming virtue" that "they are conclusively presumed illegal without further examination under the rule of reason." *BMI*, 441 U.S. at 8.

In *per se* cases, courts presume not only that the plaintiff satisfies its burden of proof by showing the defendant has engaged in one of these types of conduct, but also that there is no evidence the defendant could offer to justify the presumptively anticompetitive conduct. For example, when two direct competitors reach an agreement, the *only* effect of which is to fix their prices or limit their sales, there is no plausible procompetitive justification for such conduct. "Horizontal price fixing and output limitation are ordinarily condemned as a matter of law

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[2] "Quick look" rule of reason analysis applies when the defendant can make a showing that the conduct at issue has arguable procompetitive effects, but "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *California Dental Ass'n*, 526 U.S. at 770.

under an 'illegal *per se*' approach because the probability that these practices are anticompetitive is so high." *NCAA*, 468 U.S. at 100.

The reason that a *per se* approach is appropriate in circumstances where the conduct at issue has no possible procompetitive effects is because the benefits of such a rule in terms of certainty and judicial economy outweigh the cost of the rule's rigidity. *See GTE Sylvania*, 433 U.S. at 49-50 & n.16. To be sure, this means that the *per se* rule may condemn certain conduct that does not lessen competition. But such overbreadth is tolerated in cases where the conduct at issue has no possible procompetitive effects: "Little is lost when the court condemns a restraint that was harmless because the defendants lacked [market] power but that was socially useless in any event." 7 Areeda & Hovenkamp, *supra*, ¶ 1509c.

B. Over The Last Three Decades, This Court Has Relied On New Economic Learning And Judicial Experience To Narrow Application Of The *Per Se* Rule

If the *per se* rule is applied too broadly, and reaches conduct that enhances competition, it can be quite costly. The rule requires a plaintiff to make only a limited showing, *i.e.*, that the conduct at issue falls within a proscribed category. Having satisfied that burden, along with a showing of injury, the plaintiff is entitled to treble damages. *See* 15 U.S.C. § 15(a). The promise of such large damage awards in return for a limited investment of litigation resources encourages plaintiffs and their counsel to bring lawsuits, particularly class action lawsuits, based on *per se* theories. "The *per se* rule is the trump card of antitrust law. When an antitrust plaintiff successfully plays it, he need only tally his score." *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1362-1363 (5th Cir. 1980).

The threat of *per se* liability for treble damages has, of course, an equal and opposite effect. Unless the rule's reach is carefully circumscribed, the potential for liability

will discourage individuals and businesses from engaging in conduct that creates new goods and services, enhances economic efficiency, and benefits consumers.

Recognizing that broad application of the *per se* rule will undermine the purposes of the antitrust laws, the Court has narrowed the categories of conduct to which the rule applies. Over the last three decades, the Court has relied on new economic learning and judicial experience to hold that the *per se* rule should no longer apply to various forms of conduct that may have procompetitive effects. In *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), the Court reversed *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), where it had held that a manufacturer's competitive restrictions on the distribution of its goods, *e.g.*, the assignment of exclusive sales territories to its distributors, was subject to the *per se* rule. The Court held, instead, that such conduct should be judged under the traditional rule of reason standard. It emphasized that "[t]he market impact of [such] restrictions is complex because of their potential for a simultaneous reduction of intrabrand competition and yet stimulation of interbrand competition," and that "*per se* rules in this area may work to the detriment of the small businessmen who operate as franchisees" because it discourages firms "from using the franchise system to achieve efficiencies that it perceives as important to its successful operation." *GTE Sylvania*, 433 U.S. at 51, 57 & n.26.

Likewise, in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985), the Court rejected the application of the *per se* rule to all "group boycotts." In that case, members of a wholesale purchasing cooperative refused to allow one of their competitors to participate, thus depriving it of the benefit of the cost savings enjoyed by the other rivals. The Court applied the rule of reason, finding that the business activities of purchasing cooperatives "are not a form of concerted activity characteristically likely to result in predominantly anticompetitive effects. Rather, such cooperative arrangements would seem to be 'designed to

increase economic efficiency and render markets more, rather than less, competitive.'" *Id.* at 295 (quoting *BMI*, 441 U.S. at 20). *See also Nynex Corp. v. Discon, Inc.*, 525 U.S. 128 (1998) (*per se* rule against group boycotts does not apply to single buyer's decision to purchase from one seller rather than another).

The Court's narrowing of the application of the *per se* rule has involved price restraints as well. Most recently, in *State Oil Co. v. Khan*, 522 U.S. 3 (1997), the Court overruled *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), and held that the *per se* rule should no longer apply to agreements to establish maximum resale prices. The Court found that "there is insufficient economic justification for *per se* invalidation of vertical maximum price fixing," observing that such conduct is likely to lead to lower prices, which benefit consumers. 522 U.S. at 15, 18. Indeed, the Court found that application of the *per se* rule in this context "could in fact exacerbate problems related to the unrestrained exercise of market power by monopolist dealers" by forcing dealers to eliminate their small independent distributors and, instead, to sell directly to customers (thereby ensuring there is no "agreement" that could give rise to antitrust liability). *Id.* at 18.

Consistent with its limiting of the reach of the *per se* rule, the Court emphasized that the "prevailing standard" of antitrust analysis is the rule of reason, *GTE Sylvania*, 433 U.S. at 49, and has warned the lower courts to apply the *per se* rule only when the challenged conduct is a "naked restraint[] of trade with no purpose except stifling of competition." *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963). Indeed, precisely because "easy labels do not always supply ready answers" in the antitrust context, "[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations." *BMI*, 441 U.S. at 8-9. And, because overly broad application of the *per se* rule can undermine the purposes of the antitrust laws, the Court has cautioned that any "departure from the rule-of-reason standard must be based upon demonstrable effect rather than . . . upon

formalistic line drawing." *GTE Sylvania*, 433 U.S. at 58-59.

C. The Court of Appeals' Application Of The *Per Se* Rule To Joint Ventures Is Inconsistent With This Court's Precedents

1. For much of the 20th Century, courts viewed joint ventures between competitors with suspicion, and sometimes condemned them as *per se* unlawful. But, in 1964, in *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, this Court rejected that analytical approach. Noting the increasing importance of joint ventures to the growth and competitiveness of the post-war economy, the Court directed the lower courts to evaluate the lawfulness of joint ventures through a careful analysis of the markets at issue and the venture's likely competitive effects on those markets, *i.e.*, by using the rule of reason type of approach that courts use to evaluate the legality of business mergers. *See also NCAA*, 468 U.S. at 103 (rule of reason applies to joint ventures because "a joint selling agreement may be so efficient that it will increase the sellers' aggregate output and thus be procompetitive.").

Subsequently, in *BMI* and *Pacific Stationery*, the Court reversed lower court decisions that had held the joint ventures at issue in those cases to be *per se* unlawful. It did so notwithstanding the fact that the cases involved agreements among competitors to sell a combined product at a unified price (*BMI*) and to purchase products collectively at unified prices (*Pacific Stationery*). The Court acknowledged that the BMI joint venture "involve[d] 'price fixing' in the literal sense," but warned that "[l]iteralness is overly simplistic and often overbroad." *BMI*, 441 U.S. at 9. Because joint ventures "hold the promise of increasing a firm's efficiency and enabling it to compete more effectively . . . such combinations are judged under the rule of reason, an inquiry into market power and market structure designed to assess the combination's actual effect." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984).

2. Consistent with this analytical framework, the Court has found that there are two exceptional circumstances in which the *per se* rule may be applied in the joint venture context. First, a purported joint venture is *per se* illegal if it is a sham, *i.e.*, an arrangement that holds no promise for increasing competition or economic efficiency, but instead is simply a cloak for engaging in price fixing. *See Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 597-598 (1951).

The second exception involves certain types of "ancillary restraints." The courts have long recognized that joint ventures typically contain ancillary restraints, which are restrictions on the joint venture partners' competitive behavior *outside* the venture that are designed to promote the achievement of the venture's procompetitive objectives. *See United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281-282 (6th Cir. 1898) (Taft, J.), *aff'd*, 175 U.S. 211 (1899). For example, if two automobile manufacturers form a joint venture to produce a new type of car, they may agree not to develop cars that would compete with the joint venture's product.

Ancillary restraints generally carry "a presumption of lawfulness" and are evaluated under the rule of reason, *see* 11 Herbert Hovenkamp, *Antitrust Law* ¶ 1904 (2d ed. 2005), because restrictions of this type "contribute to the success of a cooperative venture that promises greater productivity and output." *Polk Bros.*, 776 F.2d at 189. If, however, a joint venture's partners agree to restrict competition between themselves in a manner that is wholly unrelated to the achievement of the joint venture's procompetitive purpose, such restraints may be subject to *per se* condemnation. Thus, if the two automobile manufacturers in the example above agree to fix the prices of cars that each separately produces outside of the joint venture, that restraint is wholly unrelated to the procompetitive purpose of the joint venture and may be condemned under the *per se* rule. *See, e.g., BMI*, 441 U.S. at 19-20; *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224, 229 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987).

3. The cases before the Court involve joint ventures in which petitioners, two oil companies, integrated their oil refining operations, including marketing and sales, and then set the price for the commonly produced gasoline that the ventures sell under two different brand names. The court of appeals held that the joint ventures' price-setting activities are subject to *per se* rule analysis. Pet. App. 12a-13a. This holding does not just ignore the Court's teaching with respect to the proper role of the *per se* rule in antitrust analysis of joint ventures, it stands that teaching on its head.

The court of appeals begins with the presumption that an agreement between two joint venture partners as to the price to be charged for their commonly produced product is subject to the *per se* rule, and then places the burden on the partners to prove that such conduct falls within "an exception to the *per se* prohibition on price-fixing." Pet. App. 12a. But neither of the two narrow circumstances in which the *per se* rule might apply to a joint venture are present in this case. First, the court of appeals acknowledges that the joint ventures are not shams, finding that there is a "voluminous record documenting the economic justifications for creating the joint ventures," *id.* at 4a, and observing that they were also reviewed and approved by federal and state antitrust enforcement agencies, *id.* at 5a.

Second, the price-setting conduct at issue is not an ancillary restraint because it does not restrict the ability of the joint venture partners to compete outside of the venture. It is, on the contrary, ordinary business conduct that is integral to the venture itself. Every joint venture that produces a good or service must set the price of its products. As Professor Hovenkamp concludes in discussing the example of an automobile joint venture: "Once the [joint venture] automobiles are manufactured, they are jointly owned and cannot be sold without agreement between the owners as to the price that will be charged for them"; this is not "*per se* unlawful price fixing." 11 Hovenkamp, *supra*, ¶ 1908e. Indeed, as petitioners and other *amici* explain, this is not conduct to which Section 1

of the Sherman Act should apply at all. And this is true regardless of whether the joint venture partners have completely combined, or only partially combined, their business assets in the joint venture. *See* 7 Areeda & Hovenkamp, *supra*, ¶ 1478c ("once a venture is judged to have been lawful at its inception and currently, decisions that do not affect the behavior of the participants in their *nonventure* business should generally be regarded as those of a single entity rather than the parents' daily conspiracy") (emphasis supplied).

Were the Court to apply Section 1, however, its precedents establish that where, as here, a joint venture has the promise of enhancing economic efficiency and competition, it cannot be subject to *per se* condemnation. The fact that a joint venture's partners, as part of their activities, set prices or fees relating to the venture's product does not change this conclusion. "When two partners set the price of their goods or services they are literally 'price-fixing,' but they are not *per se* in violation of the Sherman Act." *BMI*, 441 U.S. at 9. *See also Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 59 (1st Cir. 2002) (rejecting *per se* treatment of restraint on players' salaries); *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41, 47 (1st Cir. 2001) (rejecting *per se* treatment of distribution joint venture's setting of fees paid to retailers); *National Bancard Corp. v. Visa U.S.A.*, 779 F.2d 592, 602 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986) (rejecting *per se* treatment of agreement among Visa members to charge an interchange fee). The court of appeals' decision reverses this long-standing rule, and subjects joint venture partners to the risk of *per se* liability for engaging in ordinary business conduct that enhances competition.

D. The Court of Appeals' Holding Harms The Ability Of Financial Service Businesses To Compete By Threatening Their Network Joint Ventures

Unless reversed, the court of appeals' decision will place a cloud of uncertainty around all types of joint ventures, including financial services network joint ventures. This uncertainty, in turn, will encourage lawsuits – particularly class action lawsuits – by plaintiffs hoping to capitalize on the minimal burdens the *per se* rule imposes. The threat of such liability is a powerful deterrent to the use of joint venture structures and to future investment in financial services networks. This Court has repeatedly warned that the risk of "false condemnations [in antitrust cases] 'are especially costly, because they chill'" procompetitive behavior by businesses. *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)). The Court's concern is especially acute in circumstances in which plaintiffs can seek to invoke the *per se* rule and thereby avoid having to prove that the conduct at issue actually lessens competition.

If legal uncertainty undermines investment in financial services networks, the adverse effects will be felt throughout our nation's economy. Financial services networks will become less efficient, and perhaps fewer in number. New forms of payment networks may never develop. Smaller banks and financial institutions will be disproportionately affected because financial services networks afford them the advantages of scale and geographic scope that the larger competitors may already enjoy. *Cf. Khan*, 522 U.S. at 18 (threat of *per se* condemnation may force manufacturers to eliminate their small independent distributors); *GTE Sylvania*, 433 U.S. at 57 n.26 (threat of *per se* condemnation "may work to the ultimate detriment of the small businessman"). In the end, businesses, consumers and the economy as a whole will

suffer from the declining investment in and growth of our financial services industry.

CONCLUSION

For the reasons set forth above and in petitioners' briefs, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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